

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA) 1:02-CR-5197 OWW
)
 Respondent,) RE: PETITION TO RECONSIDER
) SENTENCE
 v.)
 JOSE DOLORES MENDEZ)
)
 Petitioner.)
)
)

I. INTRODUCTION

Petitioner Jose Dolores Mendez ("Petitioner"), proceeding pro se, requests reconsideration of his fifteen (15) month prison sentence. Specifically, Petitioner requests that his federal sentence be made to run concurrent with, rather than consecutive to, a sentence imposed by the State of California. Doc. 92, filed Jan. 27, 2004. The United States ("Government") opposes this petition. Doc. 93, filed Feb. 9, 2004.

II. BACKGROUND

On October 6, 2003, Petitioner pled guilty to one count of conspiracy to possess stolen mail. Doc. 89. Under the terms of his plea agreement, Petitioner agreed to waive his rights to

1 "contest his plea, conviction and sentence in any post-
2 conviction proceeding, including but not limited to a proceeding
3 under 28 U.S.C. § 2255." Doc. 87, filed Sept. 19, 2003. On
4 December 17, 2003, the district court sentenced Petitioner to
5 fifteen (15) months imprisonment for conspiracy to possess stolen
6 mail, 18 U.S.C. § 371. Doc. 91. At the time of his federal
7 sentencing, Petitioner was already serving a 32 month sentence on
8 unrelated state controlled substance charges.

9 On December 23, 2004, Petitioner sent a letter to the
10 district court asserting that his attorney "neglected to inform
11 the court that [he] is currently serving a 32 month sentence for
12 the State of California." See letter attached to Doc. 92. The
13 district court ordered all parties to respond to the letter.
14 Doc. 92, filed Jan. 27, 2004. On February 3, 2004, Petitioner's
15 counsel submitted a letter to the court stating that he could
16 find no "notes or records to indicate that the Court ruled on
17 this specific point." The United States responded on February 9,
18 2004, arguing that this court had no jurisdiction to consider the
19 matter. Doc. 93.

20 On January 25, 2005, Petitioner was released from state
21 custody and transferred to FCI Terminal Island, where he is
22 currently serving his federal sentence. Doc. 96, filed Feb. 7,
23 2005.

24 On June 14, 2005, the district court, construing
25 Petitioner's December 23, 2004 letter as a petition for habeas
26 corpus based on ineffective assistance of counsel, ordered the
27 parties to submit supplemental information concerning the
28 imposition of a concurrent sentence. Doc. 98 Specifically, the

1 district court noted that "defense counsel's failure to bring
2 Petitioner's state sentence to the attention of the sentencing
3 court could constitute ineffective assistance of counsel under
4 Strickland." *I.* at 5.

5 James R. Homola, Esq., the attorney who represented
6 Petitioner during the underlying criminal prosecution, filed a
7 supplemental declaration on June 23, 2005. Doc. 101. Mr. Homola
8 states in his declaration that

9 a conscious decision was made not to object to the
10 recommendations [in the PSR] because it was noted that
11 the PSR did not apply certain enhancements and
12 increases which had been expected to place him in a
13 less favorable Criminal History Category and increase
14 his offense level.

15 *Id.* at ¶4. Although Mr. Homola has no recollection of making a
16 specific request for a concurrent sentence in this case, he
17 "believe[s] that this was an intentional decision, based on the
18 improbability that concurrent sentences would be imposed,
19 balanced against the perceived risk of inviting reexamination of
20 the calculations of Criminal History and Offense level." *Id.* at
21 ¶5.

22 The government also filed a supplemental brief in response
23 to the district court's June 14 order, which provided legal
24 authority but no additional evidence to supplement the record.
25 Doc. 102, filed June 27, 2005.

26 III. ANALYSIS

27 A. **Waiver of right to trial by jury and post-conviction 28 reconsideration.**

29 Absent any waiver, a criminal defendant may challenge his
30 sentence in a number of ways. For example, Federal Rule of

1 Criminal Procedure 35(a) provides that "within 7 days after
2 sentencing, the court may correct a sentence that resulted from
3 arithmetical, technical, or other clear error." The court may
4 act upon a party's motion or sua sponte, but must do so within
5 the seven day window. *United States v. Colace*, 126 F.3d 1229,
6 1231 (9th Cir. 1997). After seven days has passed, the district
7 court loses jurisdiction under Rule 35 to alter the sentence.
8 See *United States v. Penna*, 319 F.3d 509, 510 (9th Cir. 2003).

9 Alternatively, a criminal defendant may challenge his
10 sentence under 28 U.S.C. § 2255, by claiming "that the sentence
11 was imposed in violation of the Constitution or laws of the
12 United States, or that the court was without jurisdiction to
13 impose such sentence, or that the sentence was in excess of the
14 maximum authorized by law, or is otherwise subject to collateral
15 attack...." *Id.*

16 Here, however, Petitioner waived his right to challenge his
17 plea or sentence before the district court. Petitioner's plea
18 agreement states, in relevant part, that:

19 3. Agreements by Defendant.

20 (d) Defendant knowingly and voluntarily waives his
21 Constitutional and statutory rights to appeal his plea and
22 conviction. This waiver of appeal includes, but is not
23 limited to, an express waiver of defendant's right to appeal
24 his plea of conviction on any ground, including any appeal
right conferred by 18 U.S.C. § 3741, and defendant further
agrees not to contest his plea, conviction and sentence in
any post-conviction proceeding, including but not limited to
a proceeding under 28 U.S.C. § 2255. The defendant,
however, reserves the right to appeal his sentence.

26 7. Waiver of Rights.

27 The defendant understands that by pleading guilty he
28 surrenders certain rights, including the following:

(a) ...the right to a public and speedy trial....

1
2
3 **9. Entire Agreement.**

4 This plea of guilty is freely and voluntarily made and
5 not the result of force or threats or of promises apart from
6 those set forth in this plea agreement. There have been no
7 representations or promises from any one as to what sentence
8 this Court will impose.

9 Doc. 87 at 3, 8, 10. Petitioner's plea-bargain agreement was
10 signed by him, his attorney, James A. Homola, and Assistant U.S.
11 Attorneys Jonathan B. Conklin and Stanley A. Boone. *Id.* at 11.

12 "[A]n express waiver of the right to appeal in a negotiated
13 plea of guilty is valid if knowingly and voluntarily made."

14 *United States v. DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir.
15 1992). "[A] Rule 11 colloquy on the waiver of the right to
16 appeal is not a prerequisite to a finding that the waiver is
17 valid; rather, a finding that the waiver is knowing and voluntary
18 is sufficient." *Id.* at 395. As long as the sentence imposed is
19 in accordance with the plea agreement, the waiver of the right to
20 appeal is enforceable. See *United States v. Michlin*, 34 F.3d
21 896, 898 (9th Cir. 1994). Defendant bears the burden of showing
22 that the waiver was not knowing and voluntary. See *id.*

23
24 **B. Expiration of the time to appeal.**

25 Petitioner reserved and did not waive his right to appeal
26 his sentence, but the time for the filing of such an appeal has
27 long since past. See Fed. R. App. Pro. 4(b)(1)(A).

28 **C. Implied ineffective assistance of counsel claim.**

29 Critically, however, construing pro se Petitioner's December

1 23, 2003 letter liberally, he arguably raises an ineffective
2 assistance of counsel claim. Petitioner suggests that "[his]
3 attorney neglected to inform the court that [he was] currently
4 serving a 32 month sentence for the State of California" at the
5 time of his federal sentencing. Petitioner's waiver of the right
6 to challenge his sentence would not extend to claims of
7 ineffective assistance of counsel brought under 28 U.S.C. § 2255.
8 *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994).
9 Again, construing Petitioner's letter liberally, the court will
10 treat it as a petition for relief under § 2255.¹

11 A defendant claiming ineffective assistance of counsel must
12 demonstrate that (1) counsel's actions were outside the wide
13 range of professionally competent assistance, and (2) that
14 defendant was prejudiced by reason of counsel's actions.

15 *Strickland v. Washington*, 466 U.S. 668, 686-90 (1984). To
16 warrant relief under *Strickland*, counsel's performance must have
17 fallen below an "objective standard of reasonableness." *Id.* at
18 688. Petitioner must demonstrate a "reasonable probability that,
19 but for his counsel's ineffectiveness, the result of his
20 proceedings would have differed." *Riggs v. Fairman*, 399 F.3d
21 1179, 1182 (9th Cir. 2005). "A reasonable probability is a
22 probability sufficient to undermine confidence in the outcome."
23 *Strickland*, 466 U.S. at 669.

24 ¹ Petitioner filed this letter within seven days of the
25 oral pronouncement of his sentence, well within the one year
26 statute of limitations associated with motions under § 2255. His
27 letter also arguably satisfies the requirements that he
28 previously applied for relief to the sentencing court. Such
relief was, in effect, denied when the seven day window for
corrections under Rule 35 was allowed to lapse.

1 A defense counsel's failure to bring Petitioner's state
2 sentence to the attention of the sentencing court could
3 constitute ineffective assistance of counsel under *Strickland*.
4 United States Sentencing Guideline § 5G1.3(c) permits the
5 sentencing court to run a federal sentence "concurrently,
6 partially concurrently, or consecutively to the prior
7 undischarged term of imprisonment to achieve a reasonable
8 punishment for the instant offense." Under applicable Ninth
9 Circuit precedent, a district court can commit plain error if it
10 fails to address U.S.S.G § 5G1.3(c) (i.e., the issue of whether
11 the federal sentence is to run concurrent or consecutive with a
12 prior state sentence). *United States v. Chea*, 231 F.3d 531 (9th
13 Cir. 2000).

14 However, "[j]udicial scrutiny of counsel's performance must
15 be highly deferential and strategic choices made after thorough
16 investigation of law and facts relevant to plausible options are
17 virtually unchallengeable." *Cooper-Smith v. Palmateer*, 397 F.3d
18 1236, 1243-44 (9th Cir. 2005). According to Mr. Homola's
19 declaration, he and Petitioner made a conscious legal decision
20 not to challenge the recommended sentence contained in the PSR
21 because it did not apply certain expected enhancements and
22 increases. Although Mr. Homola does not recall (either way)
23 whether he made a request for concurrent sentences, he
24 "believe[s] that this was an intentional decision, based on the
25 improbability that concurrent sentences would be imposed,
26 balanced against the perceived risk of inviting reexamination of
27 the calculations of Criminal History and Offense Level." Doc.
28 101 at ¶6. Mr. Homola's representations, which have not been

called into question, satisfy an "objective standard of reasonableness."

Moreover, even if Mr. Homola's failure to request concurrent sentences was the result of deficient performance, Petitioner has not established that this failure caused him any prejudice. Defendant has a substantial criminal history.² The instant offense involved a conspiracy to possess stolen mail, specifically the theft of financial documents and credit card numbers belonging to numerous individual victims. Petitioner was previously convicted in 1994 of carrying a loaded firearm, for which he received a sentence of 36 months probation, one day in jail, and a fine. PSR at 15. His probation was subsequently

² In addition, according to the government:

The probation officer contemplated recommending an upward departure, but instead chose to recommend a sentence at the top of the applicable range. The government, in what may fairly be described as a very generous offer, agreed to recommend a sentence at the bottom of that range. The court followed that recommendation.

The potential for a sentence greater than 15 months (as recommended by the government), let alone 21 months (that recommended by the PSR), clearly existed in this case. Such sentence would have been reasonable given the defendant's criminal history and the aggravating facts of this case. If the court would have departed by just twelve month, the defendant would be facing a potential sentence of 33 months (21 + 12). Such sentence, even if ordered to run concurrent, would have resulted in a sentence greater than the consecutive 15 month sentence ultimately imposed.

1 revoked and he was jailed for ten days. *Id.* In 1995, Petitioner
2 was convicted of making terrorist threats and was sentenced to
3 one year in jail and 36 months probation. PSR at 15-16. In
4 2003, he was convicted of possessing a controlled substance for
5 sale, for which he was sentenced to 32 months imprisonment. PSR
6 at 16. He was serving this state sentence at the time he was
7 sentenced by the district court.

8 Although the district court has the discretion to impose a
9 either a concurrent or consecutive sentence, a consecutive
10 sentence is most appropriate under the circumstances. U.S.S.G.
11 § 5G1.3(c). According to the Sentencing Commission's Commentary
12 to § 5G1.3, the court should be cognizant of the following:

- 13 (a) the type (e.g., determinate,
14 indeterminate/parolable) and length of the prior
15 undischarged sentence;
- 16 (b) the time served on the undischarged sentence and
17 the time likely to be served before release;
- 18 (c) the fact that the prior undischarged sentence may
19 have been imposed in state court rather than federal
20 court, or at a different time before the same or
21 different federal court; and
- 22 (d) any other circumstance relevant to the
23 determination of an appropriate sentence for the
24 instant offense.

25 Here, Petitioner was sentenced to a 32-month term of imprisonment
26 on his state conviction. He was admitted to an institution of
27 the California Department of Corrections on July 1, 2003.
28 Petitioner was released from state custody on January 25, 2005.

1 Given the 15-month sentence that was imposed for his federal
2 conviction, 85% of which should be served [**why? the parties don't**
3 **explain this]**, petitioner is due to be released from federal
4 custody in early February 2006.

5 The government points out that, had Petitioner's federal
6 sentence, imposed on December 17, 2003, been run concurrent with
7 his state sentence, it would have been completely subsumed within
8 his state term of imprisonment. The government aptly notes that
9 "such result would completely fail to account for the criminal
10 sentence, and criminal conduct, related to the federal case,
11 which is based on separate criminal conduct." *Id.* at 8.

12

13 Petitioner has failed to establish the requisite elements of
14 an ineffective assistance of counsel claim. Accordingly, his
15 request to have his federal sentence run concurrent with his
16 state sentence, construed as a petition for writ of habeas corpus
17 under 28 U.S.C. § 2255, must be **DENIED**.

18

19 SO ORDERED.

20 Dated: August 8, 2005

21
22 /s/ OLIVER W. WANGER

23
24 _____
Oliver W. Wanger
25 UNITED STATES DISTRICT JUDGE
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